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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

17 Cr. 47 (DC)

5 MAHMOUD THIAM,

6 Defendant.

Final Pretrial  
Conference

7 -----x

8 New York, N.Y.  
9 April 21, 2017  
10 9:36 a.m.

11 Before:

12 HON. DENISE COTE,

13 District Judge

14 APPEARANCES

15 JOON H. KIM

16 Acting United States Attorney for the  
Southern District of New York

17 BY: ELISHA J. KOBRE

CHRISTOPHER J. DiMASE

18 Assistant United States Attorney

19 U.S. DEPARTMENT OF JUSTICE

20 BY: LORINDA I. LARYEA

21 LAW OFFICE OF AARON GOLDSMITH, PC

Attorneys for Defendant

22 BY: AARON M. GOLDSMITH, ESQ.

23 ALSO PRESENT: KATHERINE BOSLEY, Paralegal Specialist, DOJ  
PATRICK KILLEEN, Special Agent, FBI

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(Case called)

THE DEPUTY CLERK: Is the government ready to proceed?

MR. KOBRE: Yes. Good morning, your Honor. Elisha Kobre Lorinda Laryea, and Christopher DiMase for the government. With us at counsel table is Special Agent Patrick Killeen of the FBI and Katherine Bosley, paralegal specialist with the Department of Justice.

THE DEPUTY CLERK: For the defendant Thiam, are you ready to proceed?

MR. GOLDSMITH: Ready, your Honor. Aaron Goldsmith on behalf of Mr. Thiam, who's present in court this morning.

THE COURT: Welcome, everyone.

This is our final pretrial conference. I understood that the defendant might be delayed because of arrival from the facility, but thankfully that did not happen, so we're able to proceed pretty much on time.

As I said, this is our final pretrial conference before Monday's trial, and I've just received defendant's motion to take testimony by videoconference. That's an April 20<sup>th</sup> submission that came in sometime last night, I guess. And similarly, an April 20<sup>th</sup> submission from the government that came in I guess sometime last night. And we'll get to those.

Let's march through the other issues that are on our schedule for this final pretrial conference, and those include

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1 rulings on the motions *in limine* that were made by the  
2 government.

3 Let me begin with just some housekeeping issues before  
4 I get to the motions *in limine*. I know the charging instrument  
5 here, the indictment, seeks forfeiture. Are counsel expecting  
6 that to be submitted to the jury, or will that be an issue for  
7 the Court, depending on the jury's resolution of guilt on the  
8 two counts?

9 MR. KOBRE: Your Honor, from the government's  
10 perspective, it will be an issue for the Court at sentencing.

11 THE COURT: And Mr. Goldsmith, do you agree?

12 MR. GOLDSMITH: Yes, that was my expectation.

13 THE COURT: Thank you so much.

14 Let's talk about the schedule. We begin Monday.  
15 We'll start at 9:30 in the morning, hopefully get a venire  
16 sometime after 10, and do jury selection, opening statements,  
17 testimony, and sit until 5:00. Each day thereafter, we'll  
18 begin at 9:00 with counsel and the defendant, giving us about a  
19 half an hour to resolve any outstanding evidentiary or legal  
20 issues. Testimony will begin promptly at 9:30, and again,  
21 we'll go until 5:00. We'll take a lunch break each day from  
22 roughly 12:45 to 2, midmorning and midafternoon recess at a  
23 time that's not disruptive and hopefully meets everyone's needs  
24 and desires.

25 So you are required to have all your witnesses

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1 available and prepared so we sit a full trial day. If you  
2 don't, you're deemed to have rested and we move on to the next  
3 phase of the case. For the government, that would be moving on  
4 to the defense case; for the defendant, that would be moving on  
5 to any rebuttal case or summations.

6 So in order to help us meet this schedule, I want to  
7 advise you as well that generally there are no sidebars.  
8 You're expected to discuss with each other well in advance of  
9 the issue arising any evidentiary disputes that might, if they  
10 are not resolved, require argument, oral argument to the Court,  
11 and that's why we meet about a half an hour before testimony  
12 begins, and I'm happy to stay at the end of the day, if that's  
13 necessary, too.

14 So I know you've made motions *in limine*, and I've  
15 gotten these letters from you last night which are very much in  
16 the spirit of trying to frontload any legal issues that need  
17 discussion with the Court, and I appreciate that.

18 What is the government's current estimate of the  
19 length of the trial?

20 MR. KOBRE: Your Honor, the government expects that it  
21 will get its case in within the first three to four days, so we  
22 believe that by Wednesday or Thursday -- it's hard to say  
23 exactly which -- the government will have completed its  
24 witnesses.

25 THE COURT: Okay. So I'm going to tell the jury that

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1 this case is expected to take a little over a week and tell  
2 them that it's our present expectation that it would take no  
3 longer than two weeks. I think that gives us the flexibility  
4 we need. Mr. Kobre, does that sound about right to you?

5 MR. KOBRE: It does, your Honor.

6 THE COURT: Mr. Goldsmith, does that sound about right  
7 to you?

8 MR. GOLDSMITH: Sounds about right.

9 THE COURT: Thank you.

10 Last time we were together, I know the parties were  
11 going to try to work on resolving any issues regarding  
12 translations. I know you resolved that with respect to the  
13 government's expert on Guinean law, and I've relied on that  
14 expert's statement of Guinean law provided to me in the  
15 government's submissions to craft a jury charge on the contents  
16 of Guinean law. Are there any other disputes on translations  
17 that we need to address?

18 MR. KOBRE: Your Honor, could I just have one moment,  
19 please.

20 Your Honor, the government received a number of  
21 translations and produced them to the defense just last night.  
22 I've had conversations with defense counsel. We don't  
23 anticipate that there will be any disputes over those, and we  
24 will attempt to resolve any of them, but we don't believe this  
25 is a case in which something turns on a subtlety in the

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1 translation such that these matters would be disputed, and I  
2 believe, in my conversations with defense counsel, that that's  
3 agreed upon.

4 THE COURT: Mr. Goldsmith?

5 MR. GOLDSMITH: Yes, I think that we would continue in  
6 the spirit that we have been, which is generally trying to work  
7 it out amongst ourselves. We'll flag something for the Court  
8 if there's a dispute. As Mr. Kobre just said, we got a bunch  
9 last night that my people have to look at. But I don't  
10 anticipate there will be any contest about the translation, but  
11 if one does come up, we'll certainly flag it for the Court.

12 THE COURT: Thank you so much. I appreciate that  
13 attitude and cooperation by all counsel in this case, and so  
14 I'm going to expect that if there are any disputes on  
15 translation about documents that either the government or the  
16 defendant seeks to offer in its case in chief, that those  
17 disputes will be brought to my attention at our Monday 9:30  
18 conference.

19 MR. KOBRE: Yes, your Honor.

20 THE COURT: Thank you.

21 Let's turn to the motions.

22 Oh, I guess some other just housekeeping issues. I  
23 don't have counsel stand for the jury when they enter or leave  
24 the courtroom, and you don't need to ask the Court's permission  
25 to approach a witness to show them a document. Just identify

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1 the document on the record as you are walking to the witness  
2 and leave the document with them and then return to your  
3 station to question the witness on the document. Good. So the  
4 record will just be clear that you're showing the witness  
5 Defense Exhibit C or Government Exhibit 4, and then you can  
6 return and continue with your questioning.

7 Let's turn to the government's motions *in limine*.

8 MR. GOLDSMITH: Your Honor, I'm sorry to interrupt --

9 THE COURT: Mr. Goldsmith.

10 MR. GOLDSMITH: -- but I wanted to bring up, obviously  
11 the Court had addressed scheduling and the Court had also  
12 addressed my letter from yesterday, which I notified the Court  
13 that my written invitation to certain foreign witnesses was  
14 based upon the government's earlier estimations of its case,  
15 that at least one witness may not be available until next week.  
16 The Court responded that defense witnesses should be prepared  
17 for Thursday, based upon the government's current estimation,  
18 and I just wanted to note an exception for the record. These  
19 are extraordinary circumstances for these witnesses coming from  
20 very far lands and they did have specific requirements for my  
21 request to have them come over by visa, which presented  
22 problems which is not typical for our court to have to address.  
23 So I just wanted to note that for the record.

24 THE COURT: First of all, there aren't exceptions in  
25 federal court. If you have an objection, make an objection,

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1 and I'll give you an opportunity to be heard.

2 I don't understand the basis for any objection with  
3 respect to my endorsement, but I'm going to give you an  
4 opportunity to be heard when we address your second submission  
5 of April 20<sup>th</sup> about the motion to take testimony by  
6 videoconference. Why don't we address all those issues  
7 together.

8 MR. GOLDSMITH: Very good.

9 THE COURT: Thank you.

10 So turning to the motions *in limine*, the government  
11 made six separate motions *in limine*. There is consent on four  
12 of them and certain disagreements or opposition with respect to  
13 two of them. So I'm going to list those on which I understand  
14 there is consent. And they are: the motion to instruct the  
15 jury on Guinean antibribery law, as indicated in the  
16 government's motion *in limine*; the motion to admit foreign  
17 business records from Hong Kong pursuant to Section 3505; the  
18 motion to admit records from two banks, HSBC and JPMorgan  
19 Chase, as business records pursuant to 803(6); and lastly, the  
20 motion to preclude defense from making arguments or presenting  
21 evidence concerning the statute of limitations. So those  
22 motions then are granted on consent.

23 We have two motions that I'm prepared to discuss with  
24 counsel and rule on, but I want to make sure that you had a  
25 chance to add anything that you'd like to your written



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1 submissions.

2           The first motion that there is disagreement on is the  
3 motion to preclude defense counsel from offering certain  
4 evidence and testimony regarding a document called the  
5 shareholders agreement, and the defense, as I understand it,  
6 wants to offer evidence at trial on the impact and beneficial  
7 effect of the mining contract that was issued to a Chinese  
8 entity on behalf of Republic of Guinea, and I think it brings  
9 us to an interesting legal issue about the jury charge and  
10 whether or not a motive to accept a bribe because one has an  
11 internal belief that it will ultimately benefit your country is  
12 relevant or a defense, and so that's one level, and I'm  
13 prepared to give you some legal guidance with respect to what I  
14 understand the law to be on that issue.

15           There is a second issue, and that is, I don't  
16 precisely know what documents or testimony is implicated by the  
17 defense's opposition. I can imagine, theoretically, a  
18 situation which, if the defendant took the stand, there would  
19 be broader scope for his testimony before the jury about what  
20 was in his mind and what motivated him. So I think what I'd  
21 like to do is put that aside for the moment and give you  
22 guidance, give you an opportunity to be heard and then  
23 guidance, reserving the right to address these issues anew, if  
24 necessary, if the defendant decides to take the stand at trial.

25           And let me ask Mr. Goldsmith, just in terms of the

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1 procedure, would that be helpful to just separate out the  
2 conversation for the moment as it might implicate the  
3 defendant's choice to take the stand?

4 MR. GOLDSMITH: Yes, your Honor.

5 THE COURT: Okay. Good.

6 MR. DiMASE: Your Honor?

7 THE COURT: Yes.

8 MR. DiMASE: In terms of addressing the issue, I do  
9 think it makes sense to at least discuss the difference between  
10 the defendant's subjective mind-set at the time of the  
11 agreement and other evidence. I think there is a separation  
12 there, and there might be some agreement between the parties  
13 about what might be appropriate were the defendant to testify.

14 THE COURT: So, Mr. DiMase, you are agreeing with the  
15 approach I'm taking --

16 MR. DiMASE: Your Honor --

17 THE COURT: -- to separate out --

18 MR. DiMASE: To separate it out.

19 THE COURT: -- the discussion of the defendant's  
20 testimony and the scope of that testimony from what we're now  
21 going to discuss.

22 MR. DiMASE: I think that's fine, your Honor. I would  
23 like to add something about our view, if the defendant  
24 testifies as well, but we can certainly separate them out.

25 THE COURT: Okay. Good. So reserving, again, the

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1 issue of what the scope of proper testimony might be if it  
2 comes from the defendant on the stand, putting that aside, does  
3 anyone wish to be heard with respect to this issue, the  
4 government's second motion *in limine* as it applies to other  
5 evidence?

6 MR. DiMASE: Briefly, your Honor, but would you like  
7 to hear from the government first or from Mr. Goldsmith first?

8 THE COURT: I don't think you put in a reply, which I  
9 didn't invite reply, so that's not a criticism, but I just  
10 think the ball is in your court, because you've heard now from  
11 Mr. Goldsmith, so you get a chance to respond, and then of  
12 course I'll give him a chance to be heard.

13 MR. DiMASE: Very good, your Honor. First, I just  
14 want to make clear, the shareholders agreement, as the Court is  
15 probably now aware from the submissions, is the ultimate  
16 agreement that was negotiated between Guinea and the Chinese  
17 conglomerate. There were a series of other agreements leading  
18 up to it, the memorandum of understanding, and then two,  
19 quote-unquote, master agreements, and so I think to be clear,  
20 what we're discussing is not just the shareholder agreement,  
21 it's sort of all of the agreements together and their benefit,  
22 or not, to the country of Guinea. So just to make clear what  
23 we're discussing.

24 Your Honor, I don't want to belabor the points that we  
25 already made in our motion *in limine*. I do think there is a

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1 difference between the subjective belief of the defendant at  
2 the time of the agreement and his negotiation, which we'll get  
3 to in a moment, and the defense counsel's, I would imagine,  
4 interest in cross-examining government witnesses and putting on  
5 his own witnesses to say one of two things: one, that they  
6 subjectively believe that this agreement, and the series of  
7 agreements, benefited Guinea or was in the best interest of  
8 Guinea, particularly in hindsight, questioning them about  
9 whether, looking back, this agreement was the right decision  
10 for Guinea to make. It's very clear under the case law, and  
11 under the law of Guinea, as explained by Mr. Togba, that it  
12 doesn't matter whether or not the decision or the acts that the  
13 official took was fair or not. I think that has a direct  
14 corollary in US law to Section 201, the federal bribery  
15 statute, which there's a lot of case law on the meaning of, on  
16 this issue in particular, whether something is fair or not,  
17 right or not, and the courts have made clear it doesn't matter  
18 whether the act that the person took was something they would  
19 have taken otherwise absent a bribe, whether it was an exercise  
20 of appropriate discretion within their job description, or not.  
21 The criminalization or the underlying policy issue that we're  
22 trying to deal with here is substituting the judgment of an  
23 unaffected public official, an unbiased public official, with  
24 one who has received money to do something. That is really the  
25 core of the statute, and I think it applies with equal force to

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1 Guinean antibribery laws. So it isn't about whether,  
2 subjectively looking back, this agreement was good or bad for  
3 Guinea. I want to be clear. I do think that the witnesses  
4 that testify for the government will articulate their views at  
5 the time of the agreement when the negotiations were taking  
6 place about what benefits they foresaw coming from the  
7 agreement, and in fact there will be testimony about Mr. Thiam  
8 himself articulating to many other ministers the benefits of  
9 this agreement, because he's promoting the agreement. It is  
10 the government's theory that he's doing that, at least in part,  
11 because of the bribe money he received. So it would be natural  
12 to expect him to promote, articulate the benefits of the  
13 agreement to other ministers in an effort to get that agreement  
14 executed by the Guinean government. But what I think is  
15 problematic is questions about the subjective belief of the  
16 government witnesses, and any defense witnesses that might be  
17 called, about whether the agreement was in fact good for  
18 Guinea, whether the result of the agreement benefited Guinea,  
19 and also actual evidence of the fruits of the agreement. It  
20 does not appear to be relevant under the law as described in  
21 Mr. Togba's affidavit and the corollary in US law under  
22 Section 201 whether, for example, a train was built after the  
23 agreement by the Chinese conglomerate. There are some things  
24 like that, actions that the Chinese company took following the  
25 entry into the agreement, including a train being built,

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1 including the provision of buses to the country of Guinea, and  
2 I think there were also some water treatment projects that were  
3 worked on by the Chinese company. I don't think it would be a  
4 problem for witnesses or the defendant to testify about their  
5 belief about what would happen when they were negotiating the  
6 agreement, but as far as what did happen afterwards, it just  
7 doesn't appear to be relevant under the standard, both in  
8 Guinean law and in US law.

9 THE COURT: So this is very helpful to me because I am  
10 hearing a distinction being made that I think we should focus  
11 on with care.

12 MR. DiMASE: I agree.

13 THE COURT: There is one thing about conversations, a  
14 witness taking the stand and saying, assuming it's admissible  
15 testimony, X said Y. To me, there is a separate issue about  
16 whether the witness should be asked about their own belief at  
17 the time about benefits to Guinea. And then there appears to  
18 be a third issue about what actually did happen afterwards and  
19 a fourth issue about a person's judgment in retrospect after  
20 the fact. Now as I understand it, the government is taking the  
21 position that issues three and four, what happened after the  
22 fact, and someone's current assessment of the benefits or lack  
23 of benefits is irrelevant. Am I understanding that correctly?

24 MR. DiMASE: Yes, your Honor.

25 THE COURT: But with respect to the first two issues,

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1 the government is taking the position that both are  
2 admissible -- both the statements of who said what to whom with  
3 respect to benefits but also the witness' belief at the time  
4 about the benefits. Is that relevant?

5 MR. DiMASE: Give me one moment, your Honor.

6 Your Honor, I think, with respect to the second  
7 category of evidence that you described, I think it would be  
8 admissible testimony to the extent that it explains why they  
9 decided to do what they did, i.e., in other words, why the  
10 witness decided to enter into the agreement or sign the  
11 agreement, and I think that has more to do with their  
12 understanding of what the benefits would be under the agreement  
13 rather than a broad subjective view about whether it would be  
14 good for Guinea or not. And it's a very fine distinction and  
15 maybe a distinction without a difference. But I think the key  
16 point is, the witnesses are going to testify about their view  
17 of the benefits of these agreements at the time they signed  
18 into them to explain why they were willing to enter into the  
19 agreement, and it's in part based on statements made by  
20 Mr. Thiam and other people regarding the anticipated benefits  
21 to the agreement. So that testimony is going to be elicited.

22 THE COURT: That's very helpful. Very helpful,  
23 Mr. DiMase.

24 So Mr. Goldsmith, you have heard from the government  
25 that it will not object to evidence with respect to

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1 conversations at the time of these events, the unfolding of  
2 these events, regarding benefits, who said what to whom with  
3 respect to perceived benefits that would inure to the Republic  
4 of Guinea from entering into what we're calling the umbrella  
5 shareholders agreement. You've also heard that they will not  
6 object to examination, during direct or cross-examination, of  
7 witnesses with respect to their state of mind, at the time  
8 these documents were executed or were being considered, about  
9 the benefits. But their objection is solely, as I understand  
10 it, to what actually unfolded after, for Guinea, its experience  
11 after the shareholders agreement was executed, what benefits  
12 the country did or didn't derive from them; and secondly, what  
13 a witness' current or subsequent evaluation was of the benefit  
14 or lack of benefit from the shareholders agreement to Guinea.  
15 So we have a lot of agreement now, I think, and I need to  
16 understand whether there is disagreement with respect to the  
17 latter two categories.

18 Mr. Goldsmith.

19 MR. GOLDSMITH: Yes. I thank the government for  
20 clarifying its position this morning because, as the Court  
21 mentioned, I think that does go to some of what my opposition  
22 had argued. In terms of, I guess we call it hearsay, I think  
23 largely that comes in for state of mind for what those  
24 witnesses were experiencing at the time; certainly what their  
25 beliefs and understandings were as part of the negotiations.



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1 And I do agree that that's appropriate here in court. So the  
2 latter two aspects, I would agree that an opinion in retrospect  
3 is not appropriate here. However, I do still disagree on the  
4 aspect of the actual events or the actual impact of the  
5 agreement, for one reason and one reason only. And more I  
6 guess basic than I put in my papers, the jurors in this case  
7 have heard three or four years of report after report of public  
8 corruption cases where there is a stigma of deals being made to  
9 individuals in the public, on behalf of public officials, that  
10 are undeserved or that are obtuse or obese, and if the jury is  
11 given what we thought, that this is going to benefit Guinea, we  
12 thought that this was going to work out and we were told that  
13 this was going to work out, but we leave off the denouement of  
14 what actually happened as a result of the agreement, then we  
15 open up the opportunity for the jurors to make speculative  
16 inferences that somehow these are all empty lies, somehow the  
17 Chinese conglomerate came in and didn't fulfill any of its  
18 promises or gave very basic concessions to the country and  
19 therefore bolsters the idea in their mind that a truly corrupt  
20 deal was made without the benefit of actual evidence there to  
21 support it. So that is my concern.

22 THE COURT: Thank you very much.

23 So let me give you my ruling and the basis for it, and  
24 this is to guide your preparation for trial and the  
25 examinations you conduct at trial, but if the trial, as it

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1 unfolds, gives you a belief that you should have a good ground  
2 for revisiting these issues, feel free to discuss that with  
3 each other. If you reach agreement, great; if you don't, feel  
4 free to raise it with me again.

5 So let's start with a description of what I think the  
6 controlling legal principles are. They're set forth, in the  
7 first instance, in Rules 401, 402, and 403 of the Federal Rules  
8 of Evidence. Relevant evidence is evidence that has a tendency  
9 to make the existence of any fact that is of consequence to the  
10 determination of the action more probable or less probable than  
11 it would be without the evidence. And evidence that is not  
12 relevant is inadmissible. And of course, even if relevant,  
13 evidence may be excluded if its probative value is  
14 substantially outweighed by the categories of concern listed in  
15 Rule 403.

16 Articles 192 and 194 of the Guinean Penal Code, like  
17 United States bribery law, require only that the defendant  
18 solicit or receive a thing of value in return for engaging in  
19 an act or refraining from engaging in an act. Under Guinean  
20 law it is irrelevant whether the act in question was "fair...  
21 or not."

22 United States bribery law is entirely consistent with  
23 that approach. It "makes it a crime for a public official...  
24 directly or indirectly, corruptly to demand, seek, receive,  
25 accept, or agree to receive or accept, anything of value in

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1 return for being influenced in the performance of an official  
2 act," as the Supreme Court so recently described in the  
3 *McDonnell* case, 136 S. Ct. 2365. "[A] public official is not  
4 required to actually make a decision or take an action on a  
5 question, matter, cause, suit, proceeding or controversy; it is  
6 enough that the official agreed to do so. *Ibid*, 2370-71.

7 Under United States law, that the result of the bribed  
8 official's action actually benefits the electorate does not  
9 "insulate" a defendant from criminal liability. *United States*  
10 *v. Coyne*, 4 F.3d at 113. Even if the receipt or tender of a  
11 bribe was partially motivated by a valid purpose, the  
12 participation in the act of bribery is criminal. *Ibid*. As  
13 explained in *United States v. Biaggi*, "[a] valid purpose that  
14 partially motivates a transaction does not insulate  
15 participants in an unlawful transaction from criminal  
16 liability." 909 F.2d at 683. See also *City of Columbia*,  
17 499 U.S. at 378, in which the Supreme Court noted that a mayor  
18 in that case would be "guilty of accepting a bribe even if he  
19 would or should have taken, in the public interest, the same  
20 action for which the bribe was paid." *United States v.*  
21 *Orenuga*, 430 F.3d at 1165-66; and *United States v. Lopez-Lukis*,  
22 102 F.3d at 1169 n. 13.

23 So I think the legal principles that apply here are  
24 stable, well established under both Guinean law and American  
25 law. They're entirely consistent with each other, and they

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1 give us the guidance that we need.

2           So it is entirely irrelevant what the Chinese did or  
3 didn't do with respect to the shareholders agreement in terms  
4 of fulfilling any commitments that they made or giving any  
5 benefits to the Republic of Guinea. If the jury finds beyond a  
6 reasonable doubt that a bribe was paid under Guinean law, it  
7 may take that information and apply it to the two crimes  
8 charged in the indictment and see whether the government's  
9 remaining requirements of proving guilt beyond a reasonable  
10 doubt under those two statutes are met. It would in fact be I  
11 think highly prejudicial here to introduce into this trial and  
12 try whether or not the Guinean people actually did benefit from  
13 anything the Chinese did or didn't do after the agreement was  
14 entered. It would confuse the issues; it would mislead the  
15 jury with respect to the legal standard; it is irrelevant. And  
16 therefore, based on the record before me now, and of course  
17 without prejudice to counsel revisiting these issues if, as the  
18 trial unfolds, they believe there is a basis to revisit them,  
19 there will be no evidence received as to what the Chinese did  
20 or didn't do following the execution of the shareholders  
21 agreement that did or didn't benefit Guinea. And there won't  
22 be testimony with respect to any witness' views after the fact  
23 as to whether or not actions that the Chinese took after the  
24 alleged bribe payment did or didn't benefit Guinea. And of  
25 course, again, I return to the first issue. This is all

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1 without reservation to revisiting these arguments if the  
2 defendant takes the stand. Very different standards may apply  
3 in that context, and I will want to hear from both sides before  
4 I give you guidance with respect to what the defendant may  
5 testify to, should he take the stand.

6 So I think that gives you the ruling on the  
7 government's second motion *in limine*.

8 Let's turn to the last motion *in limine* that I believe  
9 the parties have not agreed upon, and that is the fourth motion  
10 *in limine* in which the government identified statements --  
11 these were in Exhibit D to its motion papers -- the statements  
12 that it sought to offer as admissions by the defendant. These  
13 come from the FBI interview on the day of the defendant's  
14 arrest and after he had been administered *Miranda* warnings.  
15 And I've read all of the government's proposed sections that it  
16 seeks to admit. There is no argument, as I understand it, that  
17 any of those sections aren't admissible. The question is  
18 whether the remainder of the interview should come in or not,  
19 and very helpfully defense counsel, besides making that general  
20 argument, also presented a letter to me outlining the specific  
21 passages that the defendant believed were most worthy of  
22 admission under the rule of completeness. And let me just make  
23 sure I have that document at hand.

24 So in the defendant's letter of April 16 -- this was a  
25 two-page submission -- the defendant identified passages,

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1 beginning at page 46 and ending at page 185 to 186, that he  
2 believed should be offered under the rule of completeness.

3 I'm prepared to rule on this. I've gone through each  
4 of these passages, but I want to make sure that if anybody  
5 wanted to add anything to their submissions -- you know what,  
6 why don't I do this. Why don't I give you my ruling and then,  
7 once you have that, give you an opportunity to be heard, okay?  
8 So we're going to flip it.

9 First of all, let me give you the law as it applies to  
10 this issue.

11 Of course a defendant's prior statement is admissible  
12 under Rule 901(c), 801(d)(2), both as not hearsay because it's  
13 a statement by a party opponent, and that's true even if it's a  
14 false statement. They are not offered for the truth, of  
15 course. And these principles are well established in the law.  
16 I'll just read some Second Circuit citations. *United States v.*  
17 *Russo*, 302 F.3d at 43; *United States v. Marin*, 669 F.2d at 84.  
18 And as the law recognizes, the defendant may not seek to  
19 introduce his own prior statement for the truth of the matter  
20 asserted. It's hearsay and inadmissible. *United States v.*  
21 *Kadir*, 718 F.3d at 124.

22 There is an exception to all of these principles,  
23 though, and that's set forth in Rule 106, and that's the rule  
24 of completeness. So if a party introduces all or part of a  
25 writing or recorded statement, an adverse party may require the

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1 introduction at that time of any other part or any other  
2 writing or recorded statement that, in fairness, ought to be  
3 considered at the same time. And as the Second Circuit  
4 explained in *United States v. Johnson*, 507 F.3d 796,  
5 application of this principle requires the Court to weigh  
6 several factors. Under this principle, even though a statement  
7 may be hearsay, an omitted portion of a statement must be  
8 placed in evidence if necessary to explain the admitted  
9 portion, to place the admitted portion in context, to avoid  
10 misleading the jury, or to ensure fair and impartial  
11 understanding of the admitted portion. The completeness  
12 doctrine does not, however, require the admission of portions  
13 of the statement that are neither explanatory of, nor relevant  
14 to, the admitted passages.

15 And with that, let me rule first that the entire  
16 statement is not coming into evidence, under the rule of  
17 completeness. And so let me turn my examination to the  
18 individual passages.

19 There are three that the defendant has requested that  
20 I'm going to grant or grant in part. The others are denied.  
21 So let me turn to the three that I'm going to grant.

22 Let's turn to page 57. I'm referring to the Bates  
23 numbers at the bottom of Exhibit D. And on page 57, the  
24 defendant requests admission of the following: the entirety of  
25 the passage beginning at -- and these are time stamped, I

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1 think -- 20 minutes and 28 seconds on page 57, running to  
2 page 58, 21 minutes and 48 seconds. I'm denying that request  
3 except for the following. At the top of page 22, the  
4 government seeks to offer the following statement: "And the  
5 president gave us instructions to proceed and try to  
6 (inaudible) with him." They offer nothing else with respect to  
7 the highlighted portion -- that is, highlighted by the  
8 defendant. I'm going to allow the defendant to have received  
9 before the jury at that same time the following phrase: "If he  
10 wanted to bring money to the country." So it's the clause that  
11 immediately follows the portion that the government seeks to  
12 offer.

13 The next is page 64. And I'm going to allow or grant  
14 the defendant's request to admit the paragraph on page 64 that  
15 begins at minute 28, 15 seconds, and begins with the phrase:  
16 "Then there was another reason for four trips," down to the end  
17 of that page, where he was just saying "Okay."

18 And then turning to page 185, the defendant seeks  
19 admission of the remainder of page 185 and the first three  
20 lines on the top of 186, and I grant that request as well.

21 So let's start with the government. Do you want to  
22 reargue any of the three passages I've ruled are admissible?

23 MR. KOBRE: May I just have one moment, your Honor.

24 THE COURT: Let's move on. Let's move on. I'll take  
25 a brief recess later in the conference and then we'll return to



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1 this, and I'll give both the government and Mr. Goldsmith a  
2 chance to revisit these rulings, but you can assume those are  
3 my rulings unless you wish to revisit them.

4 The government's just handed up a memorandum in  
5 opposition to the defendant's Rule 15 motion. Mr. DiMase, has  
6 this been filed on ECF?

7 MR. DiMASE: Your Honor, we finished preparing it just  
8 before the conference so we haven't had a chance to file it.  
9 We will file it today.

10 THE COURT: Good. Thank you.

11 Okay. So let's turn to the issues raised through the  
12 submissions of April 20<sup>th</sup>. And again, I just saw these  
13 before I took the bench so I haven't had a chance to fully  
14 incorporate these into my analysis of the legal issues that  
15 might arise at the trial, but let's do our best and see if we  
16 can make some progress.

17 Let's start with the government's April 20<sup>th</sup> motion,  
18 or letter. It has to do with two separate issues: whether  
19 certain documents that they list, beginning with the memorandum  
20 of understanding and ending with an executive power transfer  
21 document, whether they should be received under Rule 803(8).  
22 And Mr. Goldsmith, have you had a chance to reflect on that  
23 issue?

24 MR. GOLDSMITH: Yes, your Honor. We discussed this  
25 informally with the government yesterday and reviewed their

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1 letter last night. We have no objection.

2 THE COURT: Thank you.

3 And the second is concerning four agreements, and I  
4 think this isn't necessary for us to go into because I think  
5 it's then covered by the prior agreement of the parties  
6 pursuant to Rule 803(8), but the government had made a separate  
7 argument with respect to four of the documents in that longer  
8 list and why they are admissible not as hearsay, but they're  
9 coming in under the parties' agreement so that's taken care of.

10 Then I have the two submissions from defense counsel  
11 of April 20<sup>th</sup>, the one that I said we'd return to -- that is,  
12 the letter in which I understood the defendant to be asking me  
13 for a precise date that could be entered in the visa  
14 application as the date any defense witnesses must be present  
15 to testify in this courtroom. I gave the precise date of  
16 April 27<sup>th</sup>, which is next Thursday, so that defense  
17 witnesses, if they were available to testify next Thursday,  
18 would be heard. And then the motion made later in the day  
19 yesterday, or at least I didn't receive it until this morning,  
20 to take one witness' testimony by videoconference. And that  
21 witness is Momo Sakho. He's described as an expert on Guinean  
22 law and an expert on the Guinean mining industry. Now I  
23 understand from this submission that there is no dispute about  
24 principles of Guinean law and so I understand from this  
25 submission that the principal reason for his testimony is not

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1 to testify or present evidence to me about Guinean law, because  
2 that's an issue of law for me, but instead to testify as an  
3 expert on the Guinean mining industry. Do I understand that  
4 correctly?

5 MR. GOLDSMITH: That is correct, your Honor.

6 THE COURT: Thank you. And did you make an expert  
7 disclosure for him?

8 MR. GOLDSMITH: Yes. I provided the curriculum vitae  
9 to the government, I explained what we expect his testimony to  
10 be, in more general terms, and I have provided, I think by  
11 means of this motion, the arguments which I think support the  
12 materiality of his testimony. We've discussed this particular  
13 witness on several occasions amongst the parties, and as I  
14 included in the motion, really the only issue we have is  
15 materiality. So as I explained in the motion to the Court,  
16 this is an individual who's worked in the mining sector, is  
17 familiar with the mining sector, worked as a legal adviser to  
18 the minister of mines for the Republic of Guinea, and worked as  
19 an adviser to the president of the Republic of Guinea during  
20 the relevant time and is going to be able to synthesize for the  
21 jury the mining industry, the procedures that were in place,  
22 and how they were procedures, protocols in Guinea at the time  
23 when Mr. Thiam was acting as the minister.

24 THE COURT: Procedures for what?

25 MR. GOLDSMITH: For applying for the exploration

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1 rights, applying for the ultimate drilling rights, the  
2 benefits -- I'm sorry, not the benefits, but the process that  
3 was required for the mining, for the prospective mining  
4 companies in order to obtain those rights, as it goes hand in  
5 hand with the shareholder agreements and the other agreements  
6 that are subject to this case.

7 THE COURT: I don't have a written expert disclosure.  
8 Did you --

9 MR. GOLDSMITH: No, I did not provide a written  
10 disclosure to that detail.

11 THE COURT: Okay. So why don't I take then, in as  
12 much detail as you're able to give me, the expert disclosure.

13 MR. GOLDSMITH: Sure. Through his experience working  
14 in the mining industry, he will discuss the necessary steps  
15 that a mining company has to go through in order to receive the  
16 exploration rights, who has the ability to give those  
17 exploration rights, and how --

18 THE COURT: Hold on one minute.

19 MR. GOLDSMITH: Sure.

20 THE COURT: Okay.

21 MR. GOLDSMITH: -- and how those exploration rights  
22 are granted. He will also be able to describe, from the  
23 perspective of the government of Guinea at the time, the  
24 government's protocols and procedures as to how a mining  
25 company would have applied for exploration rights.

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1 THE COURT: How is that different from what you've  
2 just said, the necessary steps? Are these the necessary steps  
3 from the government's point of view?

4 MR. GOLDSMITH: Actually, for this particular witness,  
5 both, because he's able to give the perspectives, both from a  
6 private industry perspective as well as from his role as the  
7 legal adviser of the minister of mines in 2009.

8 THE COURT: So when you say then the necessary steps  
9 for a mining company to get exploration rights, you're saying  
10 from the perspective of the mining company and from the  
11 perspective of the government.

12 MR. GOLDSMITH: Correct.

13 THE COURT: Thank you.

14 MR. GOLDSMITH: He can also discuss within his role,  
15 as the legal adviser, if there were any procedures that were  
16 suspended or changed as a result of the current regime status  
17 during that year.

18 THE COURT: And what procedures were those?

19 MR. GOLDSMITH: Essentially, as the Court will learn  
20 more, is that a number of the procedures in place were  
21 suspended temporarily during the relevant time by presidential  
22 decree. As the Court is already aware, there was a military  
23 regime in power at the time. It was seeking to influence a lot  
24 of cash into a very cash-strapped nation. And as a result,  
25 that developed into a circumstance where the president was in

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1 some instances calling the shots with his legal adviser, with  
2 the advice, to a lesser degree, of the ministers in the  
3 cabinet. He can describe that process.

4 THE COURT: And you're seeking to offer this all as  
5 expert testimony.

6 MR. GOLDSMITH: Correct.

7 THE COURT: And when did you make this disclosure to  
8 the government?

9 MR. GOLDSMITH: We've been discussing the nature of  
10 the witness for a couple of weeks. Not only --

11 THE COURT: Can you give me a date?

12 MR. GOLDSMITH: Probably around April 10<sup>th</sup> or  
13 11<sup>th</sup>. I have not gone into all of this detail with them  
14 because we've had some question mark as to whether he was even  
15 going to be able to get here to be able to testify, which falls  
16 in line with the videoconference. If the Court may or may not  
17 be aware, his visa was rejected pursuant to my request for him  
18 to come over for the purposes of trial. The justice  
19 department, through the U.S. Attorney's Office here, made a  
20 number of -- from my understanding, made a number of attempts  
21 to see what, if any, influence they may have in trying to  
22 secure his travels, and they were informed that they had no  
23 authority or ability to influence that in any way. He has  
24 reapplied for his visa, but I have not heard from him in the  
25 last three or four days as to whether or not that has been

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1 granted. So that is really the only reason that's obviated the  
2 need for the request.

3 THE COURT: So have you told him that he must be here  
4 on April 27<sup>th</sup>?

5 MR. GOLDSMITH: I have not. I initially, as of a  
6 couple weeks ago, had put in my letter of invitation for the  
7 week of May 2<sup>nd</sup> through 4<sup>th</sup>, which was in keeping with the  
8 government's earlier estimates as to how long it was going to  
9 take them to get through their case in chief.

10 THE COURT: I didn't ever hear those estimates. I  
11 heard an estimate of a two-week trial. So let's backtrack so I  
12 can get some background here. When did you make the request  
13 for this witness to come here to testify?

14 MR. GOLDSMITH: I believe the first request was on  
15 April 7<sup>th</sup> or 8<sup>th</sup>.

16 THE COURT: And then you notified the government on  
17 April 10<sup>th</sup> or 11<sup>th</sup>.

18 MR. GOLDSMITH: Yeah, it was the following week.

19 THE COURT: And when you say you made a request for  
20 him to come May 2<sup>nd</sup> or 3<sup>rd</sup>, what were you relying on in  
21 making that?

22 MR. GOLDSMITH: The government's estimate of a  
23 two-week trial. So in that thinking, knowing that the Court  
24 would not sit on a Friday, unless juries were deliberating, I  
25 assumed it would take a week for the government to get through

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1 its case in chief and then to have him as a prospective defense  
2 witness come the following week.

3 THE COURT: Okay. So you did not ask the government  
4 when it expected to rest.

5 MR. GOLDSMITH: No. Not at that time. It was only  
6 through our most recent conversations, and by that I mean the  
7 last couple of days, that the government has informed me that  
8 they expect to complete their case in chief roughly on  
9 Thursday, which was the cause of the letter that I sent to the  
10 Court last night.

11 THE COURT: Okay. And this letter that you sent  
12 refers to witnesses attempting to travel to the United States,  
13 and as I read the letter, you needed for them to have precise  
14 dates to include in their visa applications, and I tried to  
15 respond as quickly as I could, the very same day, giving you  
16 that information, which would be next Thursday, the 27<sup>th</sup>.

17 MR. GOLDSMITH: Right.

18 THE COURT: Now what witnesses are you referring to in  
19 the April 20<sup>th</sup> letter besides Mr. Sakho?

20 MR. GOLDSMITH: There is also an individual named  
21 Mohammed Aly Thiam, same spelling as the defendant although not  
22 related, who also is a lawyer in Guinea and worked as an  
23 adviser to the government at the time.

24 THE COURT: And when did you first request him to  
25 come?



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1 MR. GOLDSMITH: Actually, my understanding as of  
2 yesterday is that his visa application was approved.

3 THE COURT: So he'll be here on Thursday.

4 MR. GOLDSMITH: He will be here I believe the  
5 following Monday, on the 1<sup>st</sup>.

6 THE COURT: Okay. He has to be here this Thursday,  
7 counsel.

8 MR. GOLDSMITH: I will do whatever I can to make that  
9 happen.

10 THE COURT: Okay. Thank you.

11 So if the government rests Wednesday or Thursday, for  
12 me to put this trial over until Monday morning at 9:30 for a  
13 defense witness, I'm going to need a record of extraordinary  
14 due diligence.

15 MR. GOLDSMITH: Very well.

16 THE COURT: And I will need every witness, including  
17 the defendant, who plans to testify and is available to testify  
18 Wednesday or Thursday to take the stand so that holding the  
19 jury over until Monday morning to hear additional testimony  
20 does not unnecessarily delay the trial.

21 So before I turn to the government, Mr. Goldsmith, is  
22 there anything else you wanted to say to me about Mr. Sakho and  
23 why his testimony should be taken by video teleconference?

24 MR. GOLDSMITH: Well, as to the why, as I included in  
25 my papers, I think his testimony is important for the jurors to

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1 understand, because this is a fairly novel and precise industry  
2 that most people are not familiar with, that being the mining  
3 industry and how organizations are able to get the rights to go  
4 forward with a mine.

5 And in terms of the necessity for the videoconference,  
6 in this particular case, he's in a position where he's in a  
7 foreign country and he has, at least thus far, been denied the  
8 opportunity to travel to the United States, and as I put in my  
9 submission, the government agrees that he satisfies every other  
10 prong of Rule 15(c) except, obviously, that they are contesting  
11 the materiality aspect.

12 THE COURT: And when did you give notice to the  
13 government that you wished to take this deposition?

14 MR. GOLDSMITH: We have been collaboratively speaking  
15 over the last couple of weeks about whether he was getting the  
16 visa on a reapplication, whether there was anything that the  
17 justice department could do to help, and it was after the point  
18 where it sort of became apparent to all of us as a group that  
19 (A) justice couldn't do anything to help; and (B) I was unsure  
20 as to what his status was in reapplying. So it was the last  
21 week that we discussed whether or not he satisfied the elements  
22 of Rule 15, and to those ends, we were having those  
23 conversations, and ultimately yesterday -- I'm sorry. I had  
24 informed the government earlier this week that I was intending  
25 on filing a Rule 15 motion. I wanted to get it done on

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1 Wednesday but was unable to so I had to file yesterday.

2 THE COURT: So you gave notice to the government on,  
3 what was it, Monday or Tuesday?

4 MR. GOLDSMITH: Well, notice as to the circumstances  
5 has been ongoing for the last couple of weeks.

6 THE COURT: Right. But notice that you decided to  
7 take the deposition?

8 MR. GOLDSMITH: Was I'd say probably Monday.

9 THE COURT: Okay. So that's the 17<sup>th</sup>.

10 So just to put this in context, on April 7<sup>th</sup>, you  
11 requested the witness' presence for trial; on April 10<sup>th</sup> or  
12 11<sup>th</sup>, you gave notice to the government that you had an  
13 expert witness on the mining industry that you wished to call;  
14 on April 17<sup>th</sup>, you gave notice to the government of a desire  
15 to take the witness' deposition for use at trial in the event  
16 the visa was not granted.

17 MR. GOLDSMITH: Yes, your Honor. Those are roughly  
18 the dates. I'm not sure if it's a day or two off, if the  
19 government has a different or better recollection, but those  
20 are the rough timelines.

21 THE COURT: And you have not provided a written  
22 disclosure of expert testimony but you have today given an oral  
23 description which you believe to be its equivalent on the  
24 record.

25 MR. GOLDSMITH: Yes, your Honor. That's a copy of the

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1 initial disclosure that I provided the government on  
2 April 6<sup>th</sup>, which has Mr. Sakho's curriculum vitae, original  
3 and translated form, which I had very briefly discussed those  
4 two aspects.

5 THE COURT: Okay. I've been handed a document, an  
6 April 6<sup>th</sup> letter from Mr. Goldsmith to the government. Is this  
7 what you filed on ECF?

8 MR. GOLDSMITH: I will file it on ECF. If the Court  
9 recalls, you had placed an order so that we could not discuss  
10 this particular witness or a couple of other potential  
11 witnesses' identities because I feared some retaliation by the  
12 local government. That's sort of a mooted point at this point  
13 as Mr. Sakho has been denied his opportunity to travel to the  
14 United States seemingly through ends that are much different  
15 than ours. So I will file this retroactively.

16 THE COURT: Thank you so much.

17 Okay. So I haven't read the government's opposition  
18 to the Rule 15 motion. Just give me one second to briefly  
19 glance at it.

20 Okay. So I've briefly glanced at the government's  
21 opposition. I don't understand that the defendant is now  
22 seeking to offer character evidence through Mr. Sakho. Am I  
23 correct, Mr. Goldsmith?

24 MR. GOLDSMITH: Correct.

25 THE COURT: Good. So it's just the expert testimony

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1 we need to concern ourselves with.

2 The government indicates that you haven't made a  
3 showing of this being material in the sense of being relevant  
4 and exculpatory. Do you want to add anything before I hear  
5 from the government?

6 MR. GOLDSMITH: No, your Honor.

7 THE COURT: Okay. So who's going to speak on behalf  
8 of the government, if anyone?

9 MS. LARYEA: Thank you, your Honor.

10 I'd like to begin, your Honor, with the expert  
11 disclosure. We handed you the letter from Mr. Goldsmith dated  
12 April 16<sup>th</sup> that essentially --

13 THE COURT: April?

14 MS. LARYEA: April 6<sup>th</sup> -- I'm sorry -- that stated  
15 that Mr. Sakho would testify regarding Guinea bribery laws in  
16 effect during the relevant time period as well as the state of  
17 the Guinean government while defendant Thiam held public office  
18 and roles/responsibilities to the minister of mines.

19 As the Court knows, Rule 16 requires the defendant to  
20 give the government a written summary of any testimony that  
21 defendant intends to use under Rule 72, 73, or 75, and that  
22 summary must describe the witness' opinions, the basis and  
23 reasons for those opinions, and the witness' qualifications.  
24 This letter on April 6<sup>th</sup> is inadequate and does not meet that  
25 standard. Today is the first time the government has heard

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1 this level of detail about the subject of Mr. Sakho's  
2 testimony. And moreover, during recent conversations with  
3 defense counsel, the government was under the understanding  
4 that since Mr. Sakho no longer will be testifying about the  
5 Guinea bribery laws, the additional testimony that was being  
6 proffered was being proffered as lay testimony and no longer as  
7 expert testimony. So that was the government's understanding  
8 with respect to Mr. Sakho's testimony.

9 MR. GOLDSMITH: I'll clarify, your Honor. That is  
10 correct. That is a correct representation, that I informed  
11 them last week that in light of our agreement as to the Guinean  
12 bribery laws in effect, that he will not be used as an expert  
13 on the aspects of laws, and therefore, it would be more of a  
14 lay witness perspective from his roles.

15 THE COURT: Well, this is a completely different,  
16 then, analysis. Obviously if this is lay testimony, then you  
17 don't need to make an expert disclosure. So that's one thing.  
18 But if it's lay testimony, it would be coming in as someone who  
19 participated in the underlying events in a way that would be  
20 relevant and meaningful to the jury, and I don't hear that. I  
21 didn't hear that at all. I heard a description orally from  
22 defense counsel today about this person being called as an  
23 expert, and setting aside a whole set of issues with respect to  
24 whether that expert testimony was timely disclosed and  
25 appropriate and not reaching those issues, now hearing that

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1 it's offered as lay testimony, I don't understand how it's  
2 admissible at all.

3 So Mr. Goldsmith, let me return to you. As lay  
4 testimony, how is this admissible? Was this witness,  
5 Mr. Sakho -- please be seated, counsel. Was this witness  
6 involved in these transactions? And if so, does he seek to  
7 offer testimony about what he did in a way that is relevant to  
8 the execution of the shareholders agreement or the  
9 constellation of documents we're talking about?

10 MR. GOLDSMITH: Yes, your Honor. He was a legal  
11 adviser to the minister of mines at the time, as well as the  
12 adviser to the president at the time, so he can testify as to  
13 what happened during the approval process for the exploration  
14 rights and the negotiations and approval of the shareholder  
15 agreement.

16 THE COURT: Okay. So this is a completely different  
17 description of relevance than was made to me just a few minutes  
18 ago.

19 Okay. So I think there is a lack of meeting of the  
20 minds here. When we take our break, we'll give you all a  
21 chance to reflect on this and I'll come back and give you  
22 guidance. If he's a lay witness, that's one thing; if he's an  
23 expert witness, it's another. I just have to know which rules  
24 of evidence and principles of law I'd be applying here. And to  
25 the extent that there is a contention that any of this is

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1 exculpatory to the defendant, which I haven't heard that any of  
2 it is, I want to make sure I hear that as well.

3 Good. So I think before we move on to remaining  
4 issues, I just want to clarify the schedule again. When the  
5 government rests, whatever day that is -- and they have  
6 indicated Wednesday or Thursday -- the defendant must put on  
7 its case, if it has a case. And if it chooses not to put on a  
8 case, that is just fine, but if it chooses to put on a case, it  
9 must have its witnesses available in the court and ready to  
10 proceed. The only exception that might be made at this point  
11 to the defendant being deemed to rest without calling a  
12 particular witness is potentially Mohammed Aly Thiam, whose  
13 visa has been approved. Yesterday I gave counsel notice that a  
14 defense witness had to be available on Thursday. Apparently  
15 that information has not yet been communicated to Mr. Thiam, so  
16 I'll require his presence on Thursday or deem the defendant to  
17 have rested unless I have a showing of due diligence with  
18 respect to getting him here on Thursday, and the latest I would  
19 receive defense testimony from him would be Monday morning at  
20 9:30, assuming that the defendant had otherwise rested on  
21 Wednesday or Thursday.

22 Okay. So let's turn to other issues.

23 Let's talk about the status of plea discussions. And  
24 I'm required by the Supreme Court and the Second Circuit  
25 jurisprudence to inquire with respect to the status of plea



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1 discussions, make sure that the defendant is well aware of any  
2 plea offers that have been extended, and that defense counsel  
3 has shared those with the defendant. So I want to give you,  
4 Mr. Thiam, an opportunity to hear about those now on the  
5 record, and so it's important that you listen carefully to me  
6 as I address questions to counsel, both the government and your  
7 own attorney. Do you understand that, Mr. Thiam?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Okay. And by the way, Mr. Goldsmith, I  
10 would very much like to pronounce your client's name correctly.  
11 Could you give me instruction on that score.

12 MR. GOLDSMITH: "Tee-om."

13 THE COURT: "Tee-om." Thank you very much.

14 So let me ask the government, did the government  
15 extend a plea offer to the defendant?

16 MR. KOBRE: Your Honor, the government did not extend  
17 any formal plea offers to the defendant. There were informal  
18 plea discussions, and I can describe those for your Honor if  
19 you'd like.

20 THE COURT: Yes.

21 MR. KOBRE: So what was first discussed between the  
22 parties was the defense counsel's request that the defendant be  
23 permitted to plead guilty, not to either of the counts in the  
24 indictment but to some different or lesser charge. And the  
25 government rejected that out of right. The government insisted

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1 that the defendant plead guilty to at least one of the counts  
2 in the indictment. The government explained to defense counsel  
3 that we believe that the guidelines calculation that will apply  
4 at sentencing -- and I can run through that for your Honor, but  
5 essentially what it boiled down to, your Honor, was a  
6 guidelines range of 97 to 121 months if the defendant is  
7 convicted on both counts at trial. Would your Honor like me to  
8 walk through the guidelines calculation that leads to that?

9 THE COURT: No.

10 MR. KOBRE: Okay. Your Honor, in conversations with  
11 defense counsel, I asked if defense counsel had a proposal that  
12 the government would consider, something short of that. And  
13 defense counsel did come back with a proposal, and the proposal  
14 was a plea to Count One. That's the 1957 count. I'm sorry. I  
15 apologize, your Honor. A plea to Count Two, which is the 1956  
16 count, and a guidelines calculation resulting in an offense  
17 level of 19 and, given the defendant's criminal history  
18 category of I, a guidelines range of 30 to 37 months. That was  
19 the defense counsel's proposal. And the reason that the  
20 guidelines range is substantially lower is because, under the  
21 defense counsel's proposal, the amount of the laundered funds  
22 would be a lesser amount, because Count Two applies to a  
23 discrete transaction, a portion of the bribery proceeds. I  
24 conveyed to defense counsel that if defendant was actually  
25 willing to really consider such an offer, we would discuss it

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1 internally and we would get back to him, but we weren't going  
2 to make such an offer unless the defendant was really prepared  
3 to accept such an offer, and I conveyed that to Mr. Goldsmith.  
4 And Mr. Goldsmith came back and said that the defendant would  
5 not be interested in such an offer.

6 So that's where the plea discussions sort of left off  
7 is that the defendant was not seriously interested in  
8 considering the proposal, the best proposal, I would say, that  
9 defense counsel was able to come back with.

10 THE COURT: And Mr. Goldsmith, does that recitation  
11 accord with your recollection?

12 MR. GOLDSMITH: Yes, your Honor.

13 THE COURT: And did you discuss these issues with your  
14 client?

15 MR. GOLDSMITH: I discussed the Sentencing Guidelines  
16 as well as my proposal based upon Count Two. I did.

17 THE COURT: Thank you. And I don't want to hear the  
18 details of the discussions with your client, but have you  
19 discussed your evaluation of the strength of the evidence  
20 against him?

21 MR. GOLDSMITH: Yes, I have.

22 THE COURT: And again, I don't want to hear the  
23 substance of your conversations with him, but have you conveyed  
24 to him your own recommendation of what he consider doing with  
25 respect to a plea or with proceeding to trial?

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MR. GOLDSMITH: Yes.

THE COURT: Thank you. So Mr. Thiam, please stand.

Please place the defendant under oath.

(Defendant sworn)

THE COURT: Now, Mr. Thiam, have you taken any drugs or medicine or pills in the last 24 hours?

THE DEFENDANT: Except for my prescription medication, no.

THE COURT: And what is that prescription medication for?

THE DEFENDANT: For diabetes, high blood pressure, and high cholesterol.

THE COURT: And does that medication affect in any way your ability to understand what's happening in this proceeding?

THE DEFENDANT: No, your Honor.

THE COURT: Does it affect in any way your ability to communicate with your attorney?

THE DEFENDANT: No, your Honor.

THE COURT: Okay. Is your mind clear today?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you understand what's happening in this proceeding?

THE DEFENDANT: Yes, your Honor.

THE COURT: Okay. Now did you hear the questions I placed to the government and its responses to me with respect

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1 to the plea negotiations?

2 THE DEFENDANT: Yes, your Honor.

3 THE COURT: And did you hear the questions I placed to  
4 your attorney and his responses to me concerning those plea  
5 negotiations?

6 THE DEFENDANT: Yes, your Honor.

7 THE COURT: And was your attorney's account of his  
8 discussions with you, to the extent that he disclosed them here  
9 on the record, accurate?

10 THE DEFENDANT: Yes, your Honor.

11 THE COURT: Thank you. You may be seated.

12 Before we take our break, I know you have a couple  
13 open issues to discuss. Let me just turn to the voir dire, and  
14 then I think I'm done with my list of things to cover with you.

15 So the defendant requests, in his proposed voir dire  
16 questions, inquiry as to whether or not an individual member of  
17 the venire was born outside of the United States, and also  
18 there are a series of questions, but I think that gets to the  
19 heart of it. There is another question about whether or not  
20 the juror or the juror's parents immigrated to the United  
21 States from a West African country. And is there any objection  
22 by the government to me inquiring of the potential jurors  
23 regarding that?

24 MR. KOBRE: Just one moment, very briefly, your Honor.

25 No objection, your Honor.

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1 THE COURT: Okay. Good.

2 So let's take our break. When we come back, I'll hear  
3 any other issues that you want to discuss with respect to this  
4 final pretrial conference. I'll hear you if you have any  
5 desire to raise -- again, either the government or the  
6 defendant -- on my rulings on the completeness issue with  
7 respect to the defendant's statement, and then we'll hopefully  
8 complete our discussion about Mr. Sakho's testimony. I now  
9 understand it's being offered as lay testimony, which has its  
10 own requirements of relevance and materiality. And I am  
11 particularly interested now in understanding what role this  
12 person played that he is competent to testify about and how  
13 that would be relevant, in the first instance; and secondly,  
14 exculpatory to the defendant in the second instance.

15 Okay. Good. Thank you. Let Ms. Rojas know when  
16 you're ready to proceed.

17 THE DEPUTY CLERK: All rise.

18 (Recess)

19 (In open court)

20 THE COURT: Thank you. Counsel, I understand you're  
21 ready to resume.

22 And I understand that, Mr. Kobre, you asked my deputy  
23 to inquire whether I had any objection to you posing questions  
24 to witnesses while seated. Absolutely not. The record should  
25 reflect Mr. Kobre is in a wheelchair, and no one would expect

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1 you to do anything other than sit comfortably wherever you'd  
2 like. And because of the size of the podium, I think you can  
3 place questions, unless there is an objection from  
4 Mr. Goldsmith, from the government's counsel table.

5 Mr. Goldsmith, is that agreeable to you?

6 MR. GOLDSMITH: Of course.

7 THE COURT: Thank you very much.

8 MR. KOBRE: Thank you very much, Judge.

9 THE COURT: Yes. Okay. So let's go march through our  
10 items.

11 Let's first clean up, if there is anything to clean  
12 up, with respect to the defendant's statement on the day of his  
13 arrest. Did you, Mr. Goldsmith, wish to revisit any of my  
14 rulings in that regard?

15 MR. GOLDSMITH: What I would prefer to do, if  
16 agreeable to the Court, is reserve my right to renew my  
17 objections to the Court's decision denying the excerpts that  
18 I've proposed at such time as the government seeks to introduce  
19 the portions of the transcript which it's introducing,  
20 dependent upon what the context is at the time. So in other  
21 words, as the government seeks to introduce the portions of the  
22 transcript, I would like the opportunity to object to the  
23 Court's denial of my request, if I deem in the context it would  
24 require, under the circumstances, the requested portions from  
25 defense be added.

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1 THE COURT: Okay. So let me just inquire. Mr. Kobre,  
2 is the government planning to play this as a videotape to the  
3 jury?

4 MR. KOBRE: It is, your Honor.

5 THE COURT: And so you need rulings today in order to  
6 create one seamless videotape presentation for the jury?

7 MR. KOBRE: Yes, your Honor. Actually what we were  
8 planning on doing is creating clips of the video, so that there  
9 wouldn't be any technical issues. We can just play the clips  
10 that have been ruled upon, agreed upon. And so yes, it would  
11 be helpful to have those rulings today.

12 THE COURT: Okay. So I've given you my rulings. I've  
13 given Mr. Goldsmith an opportunity to reargue with respect to  
14 any of my rulings. His objections are preserved, as made  
15 through the April 16<sup>th</sup> letter and otherwise in his response  
16 to the motions *in limine*. So there's no need, Mr. Goldsmith,  
17 for you to renew any objection. Thank you.

18 And does the government wish to revisit any of my  
19 rulings with respect to admitted portions of the defendant's  
20 videotaped statement?

21 MR. KOBRE: No, your Honor.

22 THE COURT: Okay. Fine.

23 Let's move on then to the issue with respect to  
24 Mr. Sakho, whom I now understand is potentially a lay witness,  
25 not an expert witness. I do not understand anything about his



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1 role in the underlying transactions and what competent evidence  
2 he might have to offer, much less how it might be exculpatory  
3 to the defendant.

4 MR. GOLDSMITH: And if I may, after conferring with my  
5 team and Mr. Thiam, again, I can clarify that. Mr. Sakho was  
6 the previous adviser, I should say he was the adviser to the  
7 minister of mines immediately prior to Mr. Thiam. When  
8 Mr. Thiam was in office, Sakho was the adviser on mining to the  
9 president. Mr. Sakho was in attendance at the cabinet meetings  
10 regarding the negotiations of the specific deal. He was in a  
11 position where he was a member, a ranking member of several  
12 committees that oversaw the negotiations of that deal. He was  
13 also obviously engaged in discussions with the president at the  
14 time on the presidential level and was privy to meetings with  
15 the president and the president's opinion as to those  
16 negotiations and the effectuation of the final voting and  
17 approval of the CIF deal. My expectation, from reading the  
18 3500 material that's been coming in on a rolling basis, is that  
19 a couple of the government's witnesses are going to testify  
20 that Mr. Thiam was in a position to promote the CIF deal and to  
21 advocate on its behalf, and had perhaps undue influence beyond  
22 the role that he has as the minister of mines in order to make  
23 that happen, and I think that Mr. Sakho will be in a position  
24 to rebut that presumption, or to rebut that testimony.

25 THE COURT: By saying what?

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1 MR. GOLDSMITH: By testifying that there were  
2 transparency, by testifying that the president was the one who  
3 was promoting the deal rather than Mr. Thiam.

4 THE COURT: So if I accept his testimony, when you say  
5 rather than Mr. Thiam, is he going to be in a position to  
6 testify that Mr. Thiam did not promote the deal?

7 MR. GOLDSMITH: He would be in a position to testify  
8 that while Mr. Thiam appropriately acted as the minister of  
9 mines to present the deal and to have some level of  
10 negotiations with the deal, that the decision making and that  
11 the approval process ultimately rested with the president under  
12 the circumstances in addition to the cabinet as a whole, and  
13 that the force behind the negotiations came from the  
14 presidential office rather than the minister of mines office.

15 THE COURT: So --

16 MR. GOLDSMITH: In other words --

17 THE COURT: The witness was present at meetings and  
18 heard conversations that would permit him to testify that the  
19 defendant had a role in the negotiation and presentation of the  
20 CIF transaction but that he was not the sole person who was in  
21 favor of the transaction, nor was he the ultimate decision  
22 maker, and that the ultimate decision maker was the president  
23 and/or cabinet and that they strongly favored the CIF deal  
24 themselves. Do I summarize correctly what you're telling me?

25 MR. GOLDSMITH: Correct. And if I can synthesize it

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1 further, that Mr. Thiam was taking direction from the president  
2 rather than the other way around.

3 THE COURT: And what makes any of that exculpatory?

4 MR. GOLDSMITH: It's necessary, under the  
5 circumstances where the jury is going to hear from a couple of  
6 witnesses that Mr. Thiam is promoting the deal beyond his role  
7 as a minister of mines, because that fact in and of itself, and  
8 unanswered, could possibly lead the jurors to create -- or as  
9 circumstantial evidence to create a reasonable inference that  
10 the bribes took place based upon Mr. Thiam's prior actions as  
11 advocating more strongly than he should have been to have the  
12 country of Guinea engage in the deal with CIF.

13 THE COURT: Okay. So there's no dispute between the  
14 defense witness and the government's witnesses that the CIF  
15 deal fell within the defendant's responsibilities as minister  
16 of mines, to have a role in the negotiations and a view on the  
17 project, as I understand it. And I want to make sure I  
18 understand this accurately. You believe there will be a  
19 disagreement about how much of that negotiation and promotion  
20 fell properly within the defendant's role as minister of mines?

21 MR. GOLDSMITH: Yes. This is --

22 THE COURT: Can you give me specifics on that so I  
23 understand what the potential disagreement is, which would make  
24 this testimony potentially relevant.

25 MR. GOLDSMITH: This is a case ultimately about

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1     allegations of a bribe, so if there's a bribe there, then  
2     somehow Mr. Thiam has to have the authority, and the ability,  
3     as is in the Guinean law, to either act or fail to act, so if  
4     we have witnesses for the government that are going to  
5     describe, as I anticipate they're going to describe, that  
6     Mr. Thiam was behaving in a manner and had authority that was  
7     beyond the traditional scope of the minister of mines, then  
8     Mr. Sakho's testimony that he was in fact getting directions  
9     directly from the president would negate the government's  
10    assertion through their witnesses that Mr. Thiam had the  
11    authority and ability to act or fail to act.

12           THE COURT:   Okay.   So actually, I don't think there's  
13    anything in the law that requires the bribe to be paid to the  
14    ultimate decision maker to be unlawful.   So --

15           MR. GOLDSMITH:   I don't necessarily disagree with  
16    that, but the individual does have to have some opportunity to,  
17    again, either act or fail to act in furtherance of their role.

18           THE COURT:   But there's no dispute that as minister of  
19    mines -- in fact I think you told me, if I remember correctly,  
20    that the minister of mines had, at the relevant time, in Guinea  
21    a role to play with respect to what we're now calling the  
22    shareholders agreement.

23           MR. GOLDSMITH:   Yes, he did have a role, but this  
24    isn't just a mining deal; this is a deal that involves several  
25    infrastructure components to it.   This was something that

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1 Mr. Thiam -- while he had a role, was not something that could  
2 have been as controlling as I think the government's witnesses  
3 are going to testify about.

4 THE COURT: So let me ask the government to explain.  
5 Are you calling any witnesses that have knowledge with respect  
6 to the role of the minister of mines in Guinea?

7 MS. LARYEA: Yes, your Honor.

8 THE COURT: Who?

9 MS. LARYEA: Mr. Camara and Mr. Sande. Mr. Sande was  
10 the minister of the economy and finance at the same time as the  
11 defendant, and he can speak as to the role of the minister of  
12 mines. Mr. Camara was at different stages the chief of staff  
13 for the prime minister of Guinea, and he can also speak to the  
14 role of the minister of mines.

15 THE COURT: And how do you spell those names?

16 MS. LARYEA: Sande, S-A-N-D-E. Camara, C-A-M-A-R-A.

17 THE COURT: Okay. So I don't understand that there is  
18 ultimately going to be any dispute here with respect to the  
19 role of the minister of mines with respect to this project.  
20 Have counsel discussed that issue with each other now that  
21 we're sort of drilling down to try to understand the relevance?  
22 Have you finished those conversations?

23 MR. GOLDSMITH: We have not had any conversations as  
24 to the definition of roles specific to the minister of mines  
25 during the relevant time period.

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1           THE COURT: Okay. So I don't understand the defendant  
2 to have yet made a presentation to support a finding of  
3 materiality or much less that the witness has exculpatory  
4 information, but obviously this is an evolving issue. It was  
5 really on the eve of trial. Of course we're having, for what  
6 the Southern District normally does, a fast-track trial at  
7 defense counsel's request, but on the eve of trial the  
8 defendant has invited a witness to come to this country just a  
9 little over two weeks before trial. The request was made on  
10 April 7<sup>th</sup> to attend a trial on April 24<sup>th</sup>. There have been  
11 visa issues, and now there's a request, as of last night, to  
12 take a deposition that is opposed by the government. I haven't  
13 had a chance to investigate thoroughly the legal standards that  
14 will apply to this videotaped deposition request. Normally, of  
15 course, a request for a video deposition is made long before  
16 trial so people have the opportunity to travel abroad to take  
17 the deposition if they wish. Or maybe it's not a deposition;  
18 maybe it's to take the testimony through video live.

19           MR. GOLDSMITH: That's a more precise  
20 characterization, yes.

21           THE COURT: Okay. Thank you.

22           Anyway, I haven't had a chance to look at the legal  
23 standards with the care I'd like to. But I think our  
24 conversations this morning have been very helpful in trying to  
25 understand the nature of the request. It's no longer a request

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1 to take expert testimony; it's a request to have a lay witness  
2 testify. We're beginning to understand what the offer is with  
3 respect to relevance. So hold on just one second. Let me give  
4 you my schedule for this afternoon.

5 Okay. So I'll give you an opportunity this afternoon  
6 to discuss these issues in a fine-grain, detailed way so that  
7 we can understand precisely what testimony of relevance this  
8 witness may or may not have, how it fits in the context of the  
9 trial testimony more broadly, and to what extent it's properly  
10 understood as exculpatory, and that, of course, in part depends  
11 upon what legal standard applies. I don't think there's any  
12 dispute about the legal standard -- I'm not hearing any -- with  
13 respect to the violation of federal law charged in the  
14 indictment.

15 So I'll see you at 4:00 on that single issue.

16 Now let's --

17 MR. GOLDSMITH: Your Honor, I'd like to make a  
18 different proposal. Obviously this is a defense witness who  
19 is -- I think we may have a little bit of time to make a  
20 decision on this. What I'd like to do is -- he is French  
21 speaking and halfway around the world. What I would propose is  
22 that I have a conversation with him over the weekend, develop a  
23 very detailed written submission to the government and to the  
24 Court as to what his testimony would be on the issue so that it  
25 can be detailed, and provide that by Monday morning.

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1 THE COURT: I'll let you provide that to the  
2 government by Sunday at noon --

3 MR. GOLDSMITH: Very well.

4 THE COURT: -- and, if the government is going to make  
5 a written submission to me with respect to these issues, by  
6 Monday morning at 9, so that we're all in a position to have a  
7 meaningful conversation about this Monday at 9:30.

8 MR. GOLDSMITH: Very well. I'll provide a submission  
9 to the Court as well on Sunday.

10 THE COURT: Thank you.

11 MS. LARYEA: Your Honor, one more issue with respect  
12 to Momo Sakho. The court ordered the government not to speak  
13 with our witnesses or anyone in Guinea about Mr. Sakho. I  
14 believe Mr. Goldsmith said that request from the defense is now  
15 moot as his visa was denied and he'd already applied and so his  
16 request to attend this trial is now public. We want to confirm  
17 that we are now allowed to speak with our witnesses and others  
18 about Mr. Sakho to gather information about him.

19 MR. GOLDSMITH: Yes, your Honor. I did have that  
20 conversation with the government recently and would consent to  
21 their ability to investigate.

22 THE COURT: Thank you very much.

23 MS. LARYEA: Thank you, your Honor.

24 THE COURT: So does the government have any additional  
25 issues we need to address at this final pretrial conference?



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1 MR. DiMASE: Very briefly, your Honor.

2 As the Court is aware, the government submitted a  
3 letter on April 18<sup>th</sup> along with its request to charge in this  
4 case. It addressed the issue of whether or not the two  
5 articles, 192 and 194, represent felonies under Guinean law.

6 THE COURT: I have not focused on that letter. I  
7 don't think I've read it. Hold on.

8 MR. DiMASE: Yes, Judge.

9 THE COURT: Thank you for bringing this to my  
10 attention. I had not read it yet.

11 Any objection?

12 MR. GOLDSMITH: I've reviewed the letter. There is a  
13 tier structure under the Guinean laws of punishment that is  
14 similar to the tier structure for felonies and misdemeanors.  
15 To those ends, I'd requested from my legal expert as to whether  
16 he had any different opinion on whether it could be categorized  
17 as a felony or not. I have not gotten a response yet.

18 THE COURT: Okay. So Sunday at noon for that as well.  
19 Thank you. I'll assume that there is no objection unless I  
20 receive notice of one Sunday at noon.

21 Okay. Anything else from the government?

22 MR. KOBRE: No, your Honor.

23 THE COURT: Mr. Goldsmith, anything else?

24 MR. GOLDSMITH: A very minor housekeeping issue, your  
25 Honor. I requested through CJA e-voucher to have authorization

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1 for daily transcripts. That has not been authorized yet. And  
2 the reporter's office did contact me yesterday to follow up.

3 THE COURT: Okay. Thanks. I'll try to turn to that  
4 application today and I will approve it.

5 MR. GOLDSMITH: Thank you.

6 THE COURT: No problem.

7 Thank you, all. So I'm not going to see you at 4, but  
8 I'll see you Monday at 9:30. I look forward to next week's  
9 trial. Thanks so much.

10 THE DEPUTY CLERK: All rise.

11 (Adjourned)